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No. 1127

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

COOLEY C. BERRY,
Petitioner

v.

THE UNITED STATES,
Repondent

Petition for Writ of Certiorari to the United States Court of Claims

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IN THE

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THE UNITED STATES,
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Petition for Writ of Certiorari to the United States Court of Claims

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Your petitioner, Cooley C. Berry, plaintiff below, prays that a writ of certiorari issue to review a final order of the United States Court of Claims entered on the 17th day of December, 1965, granting the motion of the respondent, defendant below, for summary judgment and dismissing the petition of the petitioner.

OPINION BELOW

The United States Court of Claims did not render any opinion, but granted the motion of the United States for summary judgment, dismissed the petition of petitioner without argument, and without stating any reasons therefor, and denied petitioner's motion for reconsideration and oral argument. Its orders granting the motion for summary judgment and denying petitioner's motion for reconsideration and oral argument are included in the

Certified Record from the court below at pp. 39 and 88, respectively.

JURISDICTION

The final order dismissing petitioner's petition below and denying petitioner's motion for reconsideration was filed on December 17, 1965 (Cert. Rec. p. 88).

Jurisdiction of this Court is invoked under Title 28 United States Code, Section 1255.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether Section 10 of the Act of July 12, 1960 (P.L. 86-616, 74 Stat. 395), known as the White Charger Act or Project 20-3, contravenes the Constitution of the United States.

2. Whether initiation of petitioner's case under an unconstitutional statute (Act of July 12, 1960) and his retirement under another statute (Sec. 1201, Title 10 U.S.C.), renders the entire proceeding void from its inception.

3. Whether a commissioned officer of the grade of lieutenant colonel in the Regular Air Force of the United States appointed by the President, by and with the advice and consent of the Senate, pursuant to the requirements of law (Act of August 10, 1956, 70 A Stat. 507; Title 10 U.S. Code, Sec. 8284), and who is authorized by law to serve at least 28 years before retirement (Title 10, U.S. Code, Sec. 8916) can be retired mandatorily before he has completed 28 years of service without Presidential authority or approval.

4. Whether Section 8916 of Title 10, United States Code, authorizing a lieutenant colonel of the Regular Air Force of the United States, to serve 28 years before re-

tirement gives such officer a vested right in a public office which cannot be terminated except by due process of law.

5. Whether petitioner's mandatory retirement without a hearing in violation of regulations duly issued by the United States Air Force deprived him of valuable property rights without due process of law contrary to the Constitution of the United States.

6. Whether petitioner held an office with a definite and fixed tenure which could be terminated only by due process of law.

7. Whether the exercise of discretionary powers vested by Congress in the Secretary of the Air Force only by persons other than the Secretary constitutes an unlawful delegation of administrative discretion and renders petitioner's retirement void.

8. Whether compulsory retirement of petitioner without a hearing and denial of such hearing by the court below reduces the compensation unlawfully to which petitioner was entitled by statute.

9. Whether the court below dismissed petitioner's action without considering and deciding questions of fact alleged in his petition, contrary to a number of decisions of other Federal courts.

10. Whether failure by the court below to grant petitioner a hearing before dismissing his action divested him unlawfully of a vested right, contrary to the Constitution of the United States.

11. Whether the Court of Claims has so far departed from the accepted and usual course of judicial proceedings by refusing to grant petitioner an oral argument on respondent's motion for summary judgment and by refusing to reconsider its arbitrary dismissal of petitioner's petition that raises questions of fact, as to call for the exercise of this Court's supervisory powers.

STATUTES INVOLVED

The following statutory provisions are involved in this proceeding:

Section 10 of the Act of July 12, 1960 (P.L. 86-616, 74 Stat. 395)
Section 1201, Title 10 United States Code
Section 8284, Title 10 United States Code
Section 8916, Title 10 United States Code
Constitution of the United States, Amendment V.

The pertinent provisions of the statutes and Constitution are printed in the appendix hereto.

STATEMENT OF THE CASE

This action is a claim for monetary damages due petitioner as the result of an alleged illegal retirement as a Regular Air Force officer effected pursuant to selection by a Board of Officers, secretly convened by the Secretary of the Air Force, acting pursuant to the purported authority contained in Section 10, of the Act of 12 July 1960 (P.L. 86-616, 74 Stat. 395), the so-called "White Charger" Act (Cert. Rec. pp. 2, 8, 10).

Petitioner was called to Active Duty in the Air Corps of the United States Army on 27 August 1941 and served continuously on active duty until reverting to active reserve status on 1 April 1946, was recalled to active duty on 6 July 1946, and continued on active duty until his alleged illegal retirement, which occurred on 2 July 1963 (Cert. Rec. pp. 1-2).

During these periods of active duty, due to diligent and conscientious service, petitioner was promoted from time to time from the grade of second lieutenant until he reached the rank of temporary Lieutenant Colonel on 20 February 1951 and permanent Lieutenant Colonel on 3

July 1958, in which grade he was serving at the time of his alleged illegal retirement. Also during his last period of active duty, petitioner applied for and on a competitive basis was selected for appointment as a Regular Officer of the United States Air Force (Cert. Rec. pp. 2-3).

During petitioner's service as an officer, as aforesaid, he was characterized in the effectiveness and efficiency reports rendered by officers under whom he served as a "Very Fine Officer of Great Value to the Service", "Superior" or "Effectiveness Well Above Most Officers". In addition, the descriptions of the petitioner in these reports were commendatory in nature and emphasized his excellent judgment, high moral character and outstanding leadership ability (Cert. Rec. pp. 2-3).

Following representations to the Congress by the Air Force that special statutory authority was needed to get rid of some "marginal" and "substandard officers" who were not performing their "duties in a manner commensurate with the responsibilities of"—their respective grades, Section 10, of the Act of 12 July 1960, (P.L. 86-616, 74 Stat. 395) was passed by the Congress, which gave the Secretary of the Air Force temporary five year authority to convene boards of officers to select for mandatory retirement officers "in the number specified" by him (Cert. Rec. pp. 3-4).

Under the purported authority of this legislation, the board purported to act that selected petitioner for retirement, notwithstanding the fact that his record of performance clearly set him apart from the "marginal" or "substandard" officer, which record speaks for itself, but in addition, by the Air Force's own definition of the terms in the regulations governing the preparation of effectiveness reports, petitioner could not be placed in the "marginal" or "substandard" category (Cert. Rec. pp. 6, 8-9).

The respondent filed a motion for summary judgment on the ground that the "White Charger" statute was not

applicable to petitioner since he was retired for disability under another statute, 10 U.S.C. 1201 (Cert. Rec. pp. 11-15).

This motion was granted by the Court of Claims without hearing or argument by order dismissing petitioner's action filed July 12, 1965 (Cert. Rec. p. 39).

Petitioner sought to have this order reversed by filing a motion for reconsideration and oral argument, a motion for leave to file documents, and a motion to defer action on his case until all the testimony in a related case (*Norman* v. *The United States*, Ct. Cls. No. 295-62) had been taken. The Court of Claims granted petitioner's motion for leave to file documents which documents were filed and constitute a part of the record accompanying this petition. On 17 December 1965, the Court of Claims denied petitioner's motion for reconsideration and oral argument and his motion to defer action on respondent's motion for summary judgment until the evidence is completed in the *Norman* case, thus making the order granting summary judgment and dismissing petitioner's action final as of 17 December 1965. That is the action of the Court of Claims that petitioner now requests be reviewed by this Honorable Court (Cert. Rec. pp. 43-81).

Petitioner's case is not the only one of its kind in the Court of Claims. There are a number of other cases involving individuals selected for mandatory retirement by the same board or similar boards appointed under the purported authority of the "White Charger Act", as was the petitioner. It has been stipulated by parties and counsel that many facts are common to all cases. In several cases no collateral issues such as that presented in this case exist. The other cases are in the process of being heard at the present time. The allegations of the petitions in the companion cases are essentially the same in each case (Cert. Rec. p. 86).

Petitioner had been hospitalized and under medical treatment in 1959, but had been returned to full duty, and thereafter had submitted to and passed three annual Air Force physical examinations prior to his selection by the "White Charger" Board for compulsory retirement. At the time of his selection for mandatory retirement no action was pending for a retirement of any kind. On the contrary he had been forecast for further duty assignment on completion of his current tour (Cert. Rec. pp. 57-68, 69-71, 72, 74-78).

After selection by the "White Charger" Board for mandatory retirement, every action which followed thereafter was identified with the symbol "20-3" which was another designation for "White Charger". The letter of notification to petitioner stated clearly that regardless of any action taken by petitioner he would, in any event, be mandatorily released from the active list of the Air Force and retired. The physical examination taken by petitioner which resulted in the physical disability rating in connection with his retirement was taken in compliance with the requirement for such an examination incident to his mandatory retirement (Cert. Rec. pp. 54-55, 56, 74-78).

REASONS FOR GRANTING THE WRIT

Petition of petitioner should not be dismissed until the constitutionality of the "White Charger" Act (Sec. 10, P.L. 86-616, 74 Stat. 395) has been decided. Petitioner alleges in his petition in the Court of Claims and respondent admits in its motion for summary judgment that petitioner was selected for retirement by the "White Charger" Board acting under the purported authority of Section 10, P.L. 86-616. If the Act is found unconstitutional, the actions taken under the purported authority of the Act become null and void. It follows that all actions taken under the purported authority and as a consequence of the initial action would also be null and void.

Petitioner should not be denied the right to raise the question of an action under an unconstitutional statute or an illegal action based on the denial of a constitutional right even though, through subsequent actions flowing from the illegal action, a final action is taken which would otherwise be legal. The Court of Claims approved this general proposition in a recent decision, namely, *Sofranoff* v. *The United States,* (Ct. Cl. No. 9-62, decided Apr. 17, 1964) in which the Court of Claims rejected the defendant's contentions that any defect in procedure embodying the denial of a right to the plaintiff therein was cured by the issuance of a discharge otherwise legal. Here, as in *Sofranoff*, petitioner was selected by the Board to be mandatorily retired ostensibly on the basis that he was a "marginal" or "substandard" officer. Any stigma accruing to petitioner, damage to his good name and reputation, or the taking of property rights, or the removal of a vested right without due process of law as prescribed by the Fifth Amendment to the Constitution of the United States, occurred at the moment petitioner was selected arbitrarily for mandatory retirement, and the action was complete as to petitioner when he was officially notified of this fact.

This Court has recognized, in the cases of *Wieman* v. *Updegraff*, 344 U.S. 183, and *United Public Workers* v. *Mitchell*, 330 U.S. 75, that an individual's interest in Government employment is an interest that is "entitled to constitutional protection".

From the time that petitioner was notified of his selection for mandatory retirement until he actually received his retirement orders, he was under the reach of the "White Charger" action and no action thereafter could be considered voluntary in the true sense of the word, because there was no way by which petitioner could remove himself from the effects of such action.

Petitioner was an officer of the Regular Air Force. By usage the tenure of a military officer has been considered

to be for life or good behavior. The power of removal without cause never has been asserted.

Street v. *United States*, 24 Ct. Cls. 230
Wallace v. *United States*, 55 Ct. Cls. 396, affd. 257 U.S. 541, 258 U.S. 296.

Under the statutes applicable to petitioner's tenure of office he was entitled to serve for 28 years. (Title 10, United States Code, § 8916).

By statute and usage, petitioner had a vested right in his employment entitled to full constitutional protection of due process of law, 11 Am Jur 1200 § 371. No matter how these vested rights are created they are entitled to the same protection, *People ex rel Foote* v. *Clark*, 283 Ill. 221, 119 N.E. 329. Failure to exercise the right before the enactment of subsequent legislation that seeks to divest the right in no way affects or lessens such right, *Pacific Mail S.S.* v. *Jolliffe*, 69 U.S. (2 Wall) 450, see also 282 U.S. 426. Thus when a claim or right arises, no just ground exists for contending that that right fell on the repeal of the statute under which such right accrued. Air Force representatives, in testifying before the Senate sub-committee hearing on S.1795 (which later became the "White Charger" Act) stated definitely that the existing statute "guaranteed 28 years of service for permanent lieutenant colonels" (page 36 of Hearings).

Petitioner's petition alleges that he was retired under the "White Charger" Act while the respondent's Motion for Summary Judgment attempts to establish that as a matter of fact and law he was retired under another statute. Considering the allegations in the petition admitted as true for the purpose of the Motion for Summary Judgment, *Gurley* v. *Wilson*, 99 U.S. App. D.C. 336; 239 F2d 957, and considering the documentary supporting data which has been admitted in the record in the court below and which accompanies this petition, genuine issues of

material fact have been raised as to which statute governed petitioner's retirement and these issues of fact have not been tried by the Court of Claims. Arbitrary and capricious action on the part of petitioner's superiors has been alleged which resulted in the retirement of petitioner and his removal from office, to his great damage, detriment and reduction in pay to which he was entitled by law. Petitioner is entitled to be heard on these issues, *Carlin* v. *United States*, 121 Ct. Cls. 643; *Dismuke* v. *United States*, 297 U.S. 167, and to have all the evidence before the court before a decision is rendered in his case.

Failure to grant petitioner a hearing in the Court of Claims before dismissing his action, divested him unlawfully of a vested right, contrary to the Constitution of the United States. The right to be heard, the right of confrontation and cross-examination are recognized to be "vital when one's employment rights are involved".

Greene v. *McElroy*, 360 U.S. 474
Beard v. *Starr*, 370 U.S. 41, 43 (dissenting opinion)
Williams v. *Zuckert*, 296 F2d 416, cert. denied 371 U.S. 531, rehearing reversed and remanded 372 U.S. 765

This Court has recognized that an individual's interest in Government employment is an interest that is "entitled to constitutional protection".

Weiman v. *Updegraff*, 344 U.S. 183
United Public Workers v. *Mitchell*, 338 U.S. 75

The Court of Claims has so far departed from the accepted and usual course of judicial proceedings in this case by refusing to grant petitioner an oral argument on respondent's motion for summary judgment and by refusing to reconsider its arbitrary dismissal of petitioner's petition as to invoke the provisions of Rule 19 of this Court to call upon the Court to excerise its power of supervision. Petitioner's petition was dismissed without

opinion and petitioner has not been made aware of the reasons for the action of the court below in his case.

CONCLUSION

Petitioner respectfully contends that the Constitutional issue with respect to the validity of the statute should be decided before a decision is made to dismiss his petition and further that he has had a valuable property right taken away without due process of law.

The writ should be granted with a view to reversing the Order of the Court of Claims and remanding the case for trial.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

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APPENDIX

The pertinent portions of the Act of 12 July 1960, P.L. 86-616, 74 Stat. 395 follows:

"Sec. 10. (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers of the Regular Army or the Regular Air Force, as the case may be, in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers of that component on the active list in the regular grade of colonel or lieutenant colonel who have at least 20 years of service computed under section 3927(a) or 8927(a) of title 10, United States Code, whichever applies, and who have been considered more than twice but not recommended for promotion to the next higher regular grade.

"(b) A Board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board convened under this section in the Army and in the Air Force, the number specified by him for officers in any category must be at least 80 per cent of the officers in that category being considered. An officer may be considered for contination on the active list under this section only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.

"(c) Except as provided in section 1 of the Act of April 23, 1930, ch. 209, as amended (5 U.S.C. 47a), if the Secretary approves the report of a board, he shall, not later than the first day of the seventh cal-

endar month beginning after he approves the report, retire each officer who is considered but not recommended for continuation.

"(d) A member of the Army or the Air Force who is retired under this section is entitled to retired pay computed under formula A of section 3991 or 8991, respectively, of title 10."

* * * *

Section 1201, Title 10, United States Code:

§ 1201. REGULARS AND MEMBERS ON ACTIVE DUTY FOR MORE THAN 30 DAYS: RETIREMENT

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270 (b) of this title) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also determines that—

(1) based upon accepted medical principles, the disability is of a permanent nature;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Vet-

erans' Administration at the time of the determination; and either—

(i) the member has at least eight years of service computed under section 1208 of this title;

(ii) the disability is the proximate result of performing active duty; or

(iii) the disability was incurred in line of duty in time of war or national emergency. Aug. 10, 1956, c. 1041, 70A Stat. 91; amended Sept. 2, 1958, Pub.L. 85-861, § 1(28) (A), 72 Stat. 1451; Sept. 7, 1962, Pub.L. 87-651, Title I, § 107(a), 76 Stat. 508.

Section 8284, Title 10, United States Code:

§ 8284. Commissioned officers: appointment, how made.

Appointments in commissioned grades in the Regular Air Force shall be made by the President, by and with the advice and consent of the Senate. Aug. 10, 1956, c. 1041, 70A Stat. 507.

The pertinent portion of Section 8916, Title 10, United States Code follows:

§ 8916. Twenty-eight years: promotion-list lieutenant colonels

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of lieutenant colonel shall be retired, except as provided by section 47a of title 5, on the thirtieth day after he completes 28 years of service computed under section 8927(a) of this title. However, if his name is carried on the list of officers recommended for appointment to the regular grade of colonel, he shall be retained on the active list while his name is so carried.

* * * *

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1127

COOLEY C. BERRY, PETITIONER

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was a Lieutenant Colonel in the Air Force at the time of his retirement on July 2, 1963. Pursuant to Section 10 of Pub. L. 86-616, July 12, 1960 (74 Stat. 386, 395) (sometimes referred to as the "White Charger" Act), which expired by its own terms on June 30, 1965, petitioner was selected for retirement effective June 30, 1963. However, the petitioner was examined by a Physical Examination Board on April 18, 1963, and was found physically unfit for duty with a permanent disability of thirty

per cent. This Board recommended permanent retirement on the basis of its findings of physical disability. The petitioner concurred in the recommended findings of the Physical Evaluation Board, and he expressly declined to demand a formal hearing or to submit rebuttal (Record p. 30). Thereupon the Physical Review Council found petitioner's disability permanent at thirty per cent and recommended that he be retired pursuant to 10 U.S.C. 1201. On June 18, 1963, orders were issued retiring petitioner under 10 U.S.C. 1201 and 1372, effective July 2, 1963.

Petitioner subsequently brought this action in the Court of Claims alleging that he was retired under Pub. L. 86-616 (the "White Charger" Act) and that this statute was unconstitutional. The Court of Claims granted summary judgment for the government on the ground that petitioner "was retired for physical disability, with his concurrence, and was not retired under" the "White Charger" Act. *Infra*, p. 4.[1]

This decision was plainly correct and in no event presents an issue of general application warranting review by this Court. The certified records of the Department of the Air Force conclusively show that petitioner was retired under 10 U.S.C. 1201 and 1372 for physical disability. Petitioner's attack upon the constitutionality of the "White Charger" Act is academic. Even if there were some doubt of the consti-

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[1] Since petitioner has not printed the decision of the Court of Claims we have set it forth *infra*, p. 4, for the convenience of this Court.

tutionality of that Act, the Air Force clearly had authority to order petitioner to take a physical examination; upon a proper finding of physical disability, it was fully authorized to cause his retirement for such disability. Since there was no question of fact to be determined at trial, the Court of Claims properly granted the motion for summary judgment.[2]

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

APRIL, 1966

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[2] Petitioner objects to the Court of Claims' disposition of this case without argument or opinion. The Court's order, however, distinctly stated its reason for dismissing the petition, and the Court's rules provide that motions for summary judgment may be acted upon without argument. Ct. Cl. Rule 65(b)(2). Petitioner was not entitled to oral argument on the motion for summary judgment where, as here, only a narrow issue of law was presented. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 274-277. Cf. *Londoner* v. *Denver*, 210 U.S. 373.

APPENDIX

IN THE
UNITED STATES COURT OF CLAIMS

No. 331-64

COOLEY C. BERRY

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, and without oral argument, it is concluded that plaintiff was retired for physical disability, with his concurrence, and was not retired under the Act of July 12, 1960, and,

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

JAMES R. DURFEE
Acting Chief Judge

July 12, 1965

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